Supreme Court, U.S.
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No:

In The

Supreme Court of the United States

EXECUTOR, ESTATE OF CELIA KATES PHILIP BARASH, BENEFICIARY, IRVING G. KATES TRUST, SANDRA BARASH

Petitioners,

v.

NORTHERN TRUST CORPORATION, WILLIAM A. OSBORN, CEO, GWEN BOYKIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Executor, Philip Barash, pro se
Beneficiary, Sandra Barash, pro se
6 Serenite Lane
Muttontown, New York 11791
516-621-8665

QUESTIONS PRESENTED FOR REVIEW

1- The Supreme Court of the United States is obligated to protect and defend the Constitution of the United States as specifically defined under Article VI which states "This Constitution, and the **laws of the United States which shall be made in pursuance thereof;** and all treaties made, or which shall be made, under the authority of the United States, shall be the **supreme law of the land;** and the judges in every state shall be bound thereby, **any thing in the constitution or laws of any state to the contrary notwithstanding.** Can a State Court defy Federal Statutes and can a Federal Court defer to a State Court ruling that defies Federal Statute?

2- Title 28 USCS 1446 (d) is specific in that "State Court shall proceed no further with a removed case unless and until the case is remanded". Should a State Court proceed with a judgment obtained ex-parte of the current Petitioners who were Defendants, does not the Federal Statute render that judgment automatically null and void? "Once a petition for removal is filed, state court shall proceed no further and **all proceedings in state court are null and void". "After removal** jurisdiction of state court ceases and state court has duty to proceed no further even if the case was removed improperly".***Maseda v. Honda Motor Co. Ltd.*** CA 11 (Fla) 1988 861 F. 2d 1248, 128 FRD 124.

3- A Federal Court sitting in New York is obligated to look to New York State Law under diversity jurisdiction and cannot dismiss an action brought by a New York Trust under New York Estates, Powers and Trusts Law, to enforce that law against a Corporation who has fraudulently brought an

action for "judicial accounting" in a foreign state which has no jurisdiction over a New York Trust, and has falsely claimed that such trust was administered in the State of Florida, whereas evidence concluded that such trust was in fact administered in the State of Illinois.

A Federal Court in New York cannot dismiss such an action based upon "probate exception" because under New York Law trust litigation must take place in the regular courts of the state, the Supreme Court of the State of New York and not the Surrogate Court, which is a Court of limited jurisdiction and only handles Estates and Wills not trusts. Only in states where trust litigation **must take place** in a Probate Court can a Federal Court dismiss a trust action for "probate exception". Is not such dismissal reversible?

4- Can a state court award attorney fees in a Florida judgment against fees that resulted from an action in a Federal Court in the State of New York where it is clear that any award of attorney fees in Federal Court can only result in a Federal Statute making such award, when the party claiming such fees was not the same party in the New York action?

5- Can a Federal Court in New York which has had an action removed to it, and such action proceed in state court while removed and prior to remand, permit a judgment obtained prior to remand, in violation of Federal Statute become the basis for a footnote judgment of "res judicata"?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Northern Trust Corporation is a publicly traded company on the NASDAQ Exchange under the stock symbol NTRS. Its principal headquarters under Federal Law is 50 South LaSalle Street, Chicago, Illinois 60675. It is in current registration with the State of Delaware and under Federal Statute may be a citizen of Delaware or Illinois.

Northern Trust Bank of Florida, N.A. not sued but referenced is a subsidiary company licensed by the Office of the Comptroller of the Currency to conduct trust business from 700 Brickell Avenue, Miami, Florida, and claims that is has jurisdiction in Florida Courts.(This company falsely sued the Petitioners in a Florida Court claiming that it was the successor trustee of the New York Trust)

Northern Trust Company is the administrator and manager of all of the Northern Trust Corporation's trust business, is an Illinois State Bank, and is located at 50 South LaSalle Street, Chicago, Illinois 60675.(This company was the successor trustee, appointed by the beneficiaries of the trust, not sued, and did not sue. This company has only the jurisdiction of the Illinois Courts.)

The Respondent is Northern Trust Corporation but reference is made to the other companies, because actions by them are of importance to the issues.

NOTICE TO THE COURT!

As a regular course of pleading in order to deceive the tribunal, attorneys for the Respondent will state that "Northern Trust Corporation" hereinafter called "Northern Trust" and then make the Court believe that there is only one Northern Trust.

Northern Trust is not an entity and does not exist and cannot file pleadings in a Court of Law. The three companies listed above have distinct and separate jurisdictional rights.

This "Northern Trust" ploy is designed to make the Court believe that whatever any company in the Northern Trust Corporation group of companies does with its unique jurisdictional rights applies to all of the other companies.

While this may be true for the other National Brokerages, such as Smith Barney, Merrill Lynch, etc. it is not true for the Northern Trust Corporation group of separate and distinct companies.

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In The

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari be issued by this Court to review the judgments listed below:

1- Summary Order of the United States Court of Appeals for the Second Circuit denying appeal and affirming judgment of the District Court.

2- Memorandum of Decision and Order of the United States District Court for the Eastern District of New York dismissing the action against the Respondents based upon Probate Exception to Federal Diversity Jurisdiction with a footnote reference to possible "Res Judicata".

3- Final Judgment in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida with the award of attorney fees from a Federal action in the State of New York against not the same party. This action was concluded without participation of the Petitioners who were Defendants because the case had been removed to Federal Court and not remanded. (Removed December 6, 2004, judgment January 27, 2005, remanded March 29, 2005)

JURISDICTION

The date that the United States Court of Appeals denied the appeal and affirmed judgment of the District Court was November 8, 2006.

The date that a Motion for new evidence to be filed before the En Banc panel was denied was June 14, 2007.

The date that a petition for panel rehearing en banc was denied was June 19, 2007

Wherefore the time to file a Petition for Writ of Certiorari before this Court extends for 90 days from June 19, 2007, and this petition is filed on August 3, 2007 and the jurisdiction of this Court is invoked under 28 USCS Section 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1- Article VI of the United States Constitution and the mandate of this Court to uphold in particular "judges in every state shall be bound thereby" to Federal Statutes.

2- Title 28 USCS 1446 (d) in specific violation by Florida State Court and by United States District Court for the Eastern District of New York.

3- Specific failure to enforce New York State Estates, Powers and Trusts Law a requirement of Federal Courts sitting in the State of New York.

4- *Florida State Court cannot award attorney fees* in violation of Federal Statutes in a New York Federal action and award them to a party not in that action.

5- A Federal Court in New York cannot fail to apply Federal Statute concerning the continuation of a state court case while not remanded from Federal Court and offer a "res judicata' footnote judgment, when the Court offering such judgment was the Court who had not remanded the action when the Florida judgment was obtained, and therefore had "judicial notice" that the Federal Statute was not being complied with.

6- Probate exception rules and precedents were not applied properly to a New York Trust in a Federal action in the State of New York.

STATEMENT OF THE CASE

Relevant Background

On December 10, 1982, Irving G. Kates, a citizen of the State of New York executed a will which created the Irving G. Kates New York Trust. Under New York Law and New York precedents, a trust created by an instrument while the grantor was a citizen of the State of New York remains a New York Trust regardless of where the will is in final probate.

In addition, precedent includes the State in which the assets remain and where the administration and management of the trust takes place.

In 1989 shortly after the death of Irving G. Kates, the Trust was funded in the State of New York, and the trust was administered by the testamentary trustees, and administered

in the State of New York at Smith Barney in Nassau County.

In June of 2001, Celia Kates, lifetime beneficiary and testamentary trustee, due to a dispute with another of the trustees, caused the trust to award successor trusteeship to the Northern Trust Company of Chicago, Illinois.

In July 2001, the assets of the trust were transferred from Smith Barney in Garden City New York to Chicago, Illinois, whereafter, Northern Trust Company, who manages and administers all of the trust business of the Northern Trust Corporation managed and administered the trust.

THE NORTHERN TRUST FRAUD

Unknown at the time, November 2001, there appears in letterheads, titles, advertising and other pertinent types of documents the use of the name **NORTHERN TRUST and no further definition.**

In violation of the Federal Rules of the Federal Trade Commission, Northern Trust is not an entity, and was used to conceal the fact that Northern Trust Corporation has many State based and State jurisdictional companies. In fact the Federal Rules of Civil Procedure, New York State Rules of Civil Procedure deny to anyone the use of "fictitious names" in pleading in a Court of Law.

Northern Trust Company defined for Celia Kates that it had a office in Palm Beach, where in June 2001, she was in residence. However, soon afterward, Celia Kates returned to New York State where she became a citizen until her death on August 10, 2004.

Based upon the illegal use of the entity which does not exist under the law, " Northern Trust", the following events took place:

In violation of 12 CFR Chapter 1 section 9.7 (d) and 12 CFR Chapter 1 section 9.8.(a) incredibly no required agreement formally setting up a successor trusteeship and

forming the contract for the administration and management of the trust is either presented or signed between any of the many Northern Trust Corporation companies and the beneficiaries of the trust.

Although the trust assets and administration and management is now in Chicago, Illinois, the Irving G. Kates Trust remains a New York Trust. New York State Banking Law and New York State Estates, Powers and Trusts Law require that there be contracts in writing between the trustee and the beneficiaries spelling out conditions of such an arrangement. **There are none.**

All statements of account are mailed monthly from the Chicago headquarters of the Northern Trust Company and administrative documents, such as the monthly transfer of earnings from Chicago to the Celia Kates accounts in New York clearly identify Northern Trust Company of 50 South LaSalle Street, Chicago, Illinois 60675.

All statements are mailed to Celia Kates in New York, Sandra Barash in New York and to the Gloria Kates Trustee, Paul Siler in Colorado. Wherefore not a single statement of account ever is mailed from Florida or to Florida.

THE PURPOSE OF THE DECEPTION

By May of 2003, a mere 21 months after assuming the successor trusteeship it is apparent that Northern Trust Corporation, through its trust management company, has lost $ 300,000 in investments. Threatened with legal action in September 2003, Northern Trust Bank of Florida, N.A. appears in a court action as a counterclaimer even though not sued and not a Defendant.

This entity now claims in Court papers that it is the successor trustee and that documents, mainly a settlement agreement between the testamentary trustees of the Irving G. Kates Trust, **a document of which it was not a party,** and a

Court order of June 2001, both of which through error state "**Northern Trust**", without defining just which Northern Trust Company is represented. **There is no entity entitled simply as "Northern Trust" and a fictitious name is not a legal person in any document to be considered by a court of law.**

The reason for such deception becomes clear. By the false use of the Florida subsidiary, not the appointed trustee of the trust, Northern Trust Corporation hopes to defray any charges of mismanagement or ultra vires acts.

In November of 2003, the officer of Northern Trust Corporation, Gwen Boykin, a Defendant herein, swears an oath that she is a vice president of the Northern Trust Co. and that her office is in Palm Beach. She further swears in a deposition taken by the Northern Trust Bank of Florida, N.A. Florida attorney that she hired him to represent the Northern Trust Company. There is only one such company, and it is an Illinois State Bank with jurisdiction in Illinois Courts not in Florida Courts.

However, despite these sworn statements, Northern Trust Bank of Florida, N.A. has appeared in a Florida Court and falsely stated that it was the successor trustee, and in addition that the trust was administered in the State of Florida.

Northern Trust Bank of Florida, N.A. persues a false counterclaim against beneficiaries of the Trust and removes $ 68,000 from the Celia Kates portion of the Irving G. Kates trust for legal fees and expenses while this 94 year old woman is not even a party to any lawsuit. During this event, Northern Trust Corporation ignores a Court order ending their case and directing mediation and pursues a course of extortion refusing to pay Celia Kates' bills until the false counterclaim is paid back to the trust. The purpose of the trust at this point is to pay for Celia Kates' living expenses **without regard to her personal assets.**

On August 10, 2004 Celia Kates dies at the age of 97 years 6 months. Under significant New York State law, both precedent and statutory, the Estate of the trustee ends upon the end of the purpose of the trust, **and the assets of the trust are the property of the remaindermen without any need of conveyance upon the part of the trustee.**

The attorney for Northern Trust Bank of Florida send a notice that the trust has ended and that upon the signing of a release of all claims against the Northern Trust Companies, the moneys will be turned over.

The Estate of Celia Kates and Sandra Barash at this point have had more than $ 350,000 disappear from their values of the trust without either an agreement in place authorizing such acts, and it is clear that there has been significant ultra vires acts committed. They refuse to sign any release and demand that the funds be turned over.

At no time in any pleading has the Respondent or any of the companies owned by it claimed that the trust was other than a New York Trust.

Despite all this the Respondent holds the funds in hostage and has removed $ 160,000 for its own use in trying to prevent any trial against its acts and refuses to release the funds in the trust for which it is no longer legal trustee.

Despite the mandates under New York Law that the trustee retains no power over a trust once the trust has ended and despite significant precedent law that a trustee does not have an automatic right to sue for judicial accounting, 70 days after the trust ended, Northern Trust Bank of Florida, N.A. enters a Florida Court and sues the Petitioners for judicial accounting. In a Florida Court in order to obtain a decree for judicial accounting the trustee must only show that he delivered statements of account.

Northern Trust Bank of Florida, N.A. files a false complaint, stating that it is the successor trustee of the trust and that the trust was administered in the State of Florida. it

then proceeds to produce statements of account that were mailed from Chicago, Illinois to New York and Colorado, which defies Florida Statute 737.101 which states that a trust is administered in the State in which the records are kept. Proof that Illinois is such that state.

PETITIONERS FILE A PROPER LAWSUIT AGAINST NORTHERN TRUST CORPORATION FOR MISMANAGEMENT OF THE TRUST AND ULTRA VIRES ACTS IN A NEW YORK FEDERAL COURT.

Petitioners had filed two motions to dismiss the lawsuit by Northern Trust Bank of Florida, N.A. for lack of venue, and lack of jurisdiction. The Florida attorney for the Respondent orders out a hearing without the attendance of the petitioners on November 18, 2004 for the purpose of having the Court deny the dismissal because the Petitioners did not attend by telephone, Petitioners are New York citizens, and the Court agrees.

On November 30, 2004, Petitioners file an action against the Respondents, Northern Trust Corporation, William A. Osborn, CEO for mismanagement and ultra vires acts. **This is a proper action under diversity jurisdiction in the United States District Court for the Eastern District of New York.**

Shortly thereafter, an Article 19 complaint is filed due to the realization of the acts committed by Gwen Boykin an officer of the company, and accepted by the Court, and she is added as a Defendant.

On December 9, 2004 a telephone hearing is scheduled by the Florida Court to set a trial date for action for judicial accounting. Petitioners file several motions asking that the case be dismissed for improper venue, and asking for delay in the trial date so that the Petitioners can have time for discovery to prove their allegations.

On December 6, 2004, without prior warning, the telephone rings and Judge Martin states that the hearing is in progress. Petitioners ask if the motions filed for the original December 9, 2004 date are to be heard. Judge Martin says that the Court needed to change the date of the hearing and that there is no hearing on December 9, 2004, and she has no motions for consideration by the Petitioners. She is to set a trial date for the judicial accounting case.

Petitioners state that they have had no discovery to prove that there is no jurisdiction for judicial accounting in a Florida Court. Judge Martin denies the verbal motion.

Petitioners state that based upon their information no venue or jurisdiction exists in Florida and that this day, December 6, 2004, the case for Judicial Accounting will be removed to Federal Court in New York.

Judge Martin asks, "The whole case?" Petitioners state, "Yes the whole case." Judicial notice complete.

On December 6, 2004, Petitioners file a petition for removal of the Florida Case with the Clerk of the Court for the United States District Court for the Eastern District of New York, pay the fee, and notice the State Court in Florida of the removal, and file a motion to consolidate both cases.

On December 7, 2004 the Clerk of the Court notices the Petitioners that the case has been accepted in removal.

Although it is clear in Appendix B, the Florida judgment for judicial accounting that Gloria Kates is not a Defendant, but a Plaintiff, she files for remand of the Florida action by claiming that she is a Defendant. The attorney for Northern Trust Corporation in New York files for remand based upon the perception that the removal was not proper.

Although this may be a correct filing, it is not correct for the Florida attorney for the Northern Trust Bank of Florida, N.A. to file a motion with the Florida Court in which a single Florida precedent, not even a Florida statute, implies that a state court may proceed anyway with a "removed case"

federal law notwithstanding. Incredibly, Judge Martin issues an order refusing to allow the Clerk of the Court to send the case papers to New York and sets a trial date of January 27, 2005 to continue the case despite removal

Petitioners spend $ 900 in fees and have the clerk of the Florida Court send the papers from the action for judicial accounting to the Federal Court in New York. The New York Federal Judge is required to review the state court proceedings prior to consideration of remand. The Florida Court has only prohibited the clerk from sending the court papers free of charge. The Petitioners have the right to pay for such transfer of pleadings.

PETITIONERS ARE NEVER NOTICED OF THE FLORIDA TRIAL DATE

The action for judicial accounting is now in New York. Unaware that the case is proceeding in violation of Federal Law in Florida, and strangely so since the Northern Trust Corporation attorney in New York is pressing for a remand, and does not inform the Petitioners of the continued action in Florida, the Florida attorney for the Northern Trust Bank of Florida, N.A. files deposition hearings for the Petitioners with the Court, but not served. He then applies to the Court by motion that failure of the Petitioners to show up for their depositions in Florida (citizens of New York) that the Court should deny any attempt for them to appear at the trial. There is no record on the ruling that Judge Martin may have made on this motion, but it shows a deliberate attempt to conduct the "trial" without the participation of the parties.

Appendix B clearly shows that the Petitioners did not attend the trial, they were not noticed, and the case had been removed and not remanded.

After extensive motion practice during which the Petitioners oppose remand, the United States District Court

for the Eastern District of New York approves an order for remand dated March 29, 2005.

In a strange bending of Federal Rules of Civil Procedure, the Defendant in the action filed on November 30, 2004, amended complaint February 2005, never files any answer to the complaint, but files a motion to dismiss.

On November 17, 2005, the United States District Court for the Eastern District of New York in the Memorandum of Decision and Order dismisses the action brought by the Petitioners based upon "probate exception". The Court recognizes the petitioners claims that the action brought for judicial accounting by the Northern Trust Bank of Florida, N.A. "had no standing to bring the Florida action and did so fraudulently". The Court continues "The Court may not dismiss a complaint under Rule 12(b)(c) unless it appears beyond doubt that the plaintiff can prove no set of facts to support his claim."The Court cites ***Aetna Cas and Sur Co v. Aniero Concrete Co.*** 404 F. 3d 566, 604 (2d Cir 2005) The Court further explains "The Court must accept all factual allegations in the proposed complaint as true and draw all reasonable inferences in favor of the plaintiff" and then cites: ***King v. Simpson,*** 189 F. 3d 284, 287(2d Cir 1999) and ***Jaghory v. New York State Dept. of Educ.*** 131 F 3d, 326, 329 (2d Cir 1997).

Having clearly defined that the Plaintiff in the action in the Florida probate action was not the trustee of the trust and appeared "without standing", and that the proofs, and many were placed into evidence, that Northern Trust Company of Chicago was the successor trustee and that the trust had been managed and administered in Illinois, leaving no possibility of proper jurisdiction in a Florida probate court, in a stunning reversal of what was just stated, the Court dismisses the complaint upon "probate exception".

In a footnote, on page 5 (Appendix A) the Court makes reference that the instant action is barred under res

judicata and collateral estoppel. The court then states "a final judgment on the merits of an action precludes parties from relitigating issues that were or could have been raised in that action". The Court refers to the judgment of January 27, 2005 obtained without participation of the Petitioners in the Florida probate court while the very case in question, the action for judicial accounting had been removed to this very Federal Court. In a footnote on page 6 (Appendix A) this court recognizes that the judicial accounting proceeding which had been removed and was 04 CV 5295 had not been remanded until March 29, 2005.

What this court fails to explain is just how a judgment obtained by a trustee who had no standing in a Florida probate court, obtained prior to remand in gross violation of Federal Law USCS 1446 (d) and hundreds of precedents which render such judgment null and void, and clearly obtained by fraud, can possibly permit this court to dismiss the action under "probate exception" and "issues that were raised or could have been raised in a Florida probate court."

No issues of the complaint were raised in the Florida Court and the Petitioners filed repeated motions denying that the Florida Court had venue or jurisdiction over a New York Trust. In fact in ***Buenger v. Kennedy*** 151 So 2d 463, Fla App.2 Dist 1963 "New York Law applies to New York Trusts in a Florida Court." There is no issues that "could have been raised" unless under New York Law. New York law prohibits a trustee from any action against beneficiaries after the trust has ended.

The Florida Court had no proper venue or jurisdiction to proceed and the New York Federal Court was aware of it, yet the dismissal was improper. ***In Perry v. Agnew*** 903 So 2d 376, "Statute providing that court shall not entertain proceedings concerning a trust that has its principal place of administration in other state must be observed." Also in

Peary v. Parrish 385 So 2d 1034 "Venue lies where trust assets are located." **Trust assets are located in Chicago, Illinois. Jurisdiction and venue were improper in a Florida probate court and it was known, alleged and was the basis for no dismissal by the Federal Court in New York.**

A proper notice of appeal was filed on December 12, 2005 and the appeal was accepted by the United States Court of Appeals for the Second Circuit which became Case No: 05-6311-cv.

On November 8, 2006 the Appeals Court affirmed the lower court judgment, Motion for inclusion of new evidence was denied on June 14, 2007, a petition for en banc rehearing was denied on June 19, 2007.

STATEMENT REQUIRED UNDER RULE 14 (g)(ii)

A review of the judgment of the United States Court of Appeals for the Second Circuit is sought, and the case that was brought in the United States District Court for the Eastern District of New York was properly brought under Federal Diversity of Citizenship and for the jurisdictional amount which exceeded $ 75,000. Accordingly, the requirements have been met for federal diversity jurisdiction in the Court of first instance.

STATEMENT REQUIRED UNDER RULE 14 (h)

The United States Court of Appeals for the Second Circuit has decided an important question of Federal Law, and an important Constitutional question, that has not been, but should be settled by this Court, and has decided an important Federal question in a way that conflicts with the relevant decisions of this Court.

ARGUMENT WHY THE WRIT SHOULD BE ALLOWED INCLUDING APPLICABLE CITATIONS.

(Pursuant to Rule 14 (h))

An important Constitutional Issue of whether a state court may with deliberation trash a Federal Statute and while a Federal Court knowing that a judgment was obtained in the continuation of an action removed, even as the Federal Court has evidence that such action was initiated and continued fraudulently, and that such continuation violated Federal Statute, yet proceeded to dismiss the federal Court action based upon two diverse theories, "res judicata" and probate exception.

The Constitutional issue is framed by the deliberate continuation of a removed case, by the state court, and the approval by a Federal Court which was the court that "knew" the case had not been remanded.

Northern Trust Bank of Floirda, N.A. who knew that they had continued the Florida case in violation of USCS 1446 (d), and knew that the attorney for the Northern Trust Corporation had filed for remand in New York, never even sought to complete their claim by continuing a valid action in the Florida Court after remand of March 29, 2005 but have continued to rely upon the invalid judgment of January 27, 2005 which is null and void by action of the federal statute.

This Court is mandated to enforce the United States Constitution and is the primary Court required to perform that specific function

Article VI is in clear. concise language. "This constitution, and the laws of the United States which shall be made in pursuance thereof.....shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary, not withstanding. (The excuse relied upon by the state court

in continuing the action while the case has not been remanded was a single Florida precedent, an insufficient excuse for the failure to follow federal law.)

The Federal Court in New York was equally required to nullify the January 27, 2005 judgment for judicial accounting obtained in a Florida Court by a fraudulent Plaintiff, but instead in violation of constitutional mandates affirmed that ill begotten judgment, and in a footnote, adding insult to injury outlined certain principles of "res judicata" all of which the New York Federal Court had reason to believe did not apply to conclusive verdict of "res judicata" Perhaps that is why it was a footnote, yet the United States Court of Appeals for the Second Circuit, despite contrary evidence did chose to assert "res judicata" in its decision to affirm the faulty ruling in the court of first instance.

Based upon the proofs submitted to the Appeals Court it should have vacated the judgment of the Florida Court by action of the Federal Statute USCS 1446 (d), and by virtue of the proofs offered that the Plaintiff in that action, Northern Trust Bank of Florida, N.A. was not the trustee of the trust and acted fraudulently, and that the court of first instance must vacate its judgment and permit discovery and jury trial, under remand.

In ***Ocean Energy Inc. v. Plaquemines Parish Govt.*** 880 So 2d 1 (LA 2004) also:***State Ex Rel King v. Summit County Council*** 990 Ohio St 3d 172, 2003, Ohio 3050, 789 NE 2d 1108, also: ***Anderson v. United Parcel Service*** 2004 UT 57, 96 P 3d 903 (Utah 2004) "Language of a Constitional provision should be construed as writtten and words employed be given their natural and obvious significance."

In ***United States v. Ashland Oil & Transport Co.*** 504 F, 2d 1317 (6th Cir 1974) "Validity of an Act of Congress depends on whether power to enact statute has been granted by the Constitution."

In ***Cooper v. State*** 277 Ga 282, 587, SE 2d 605 (2003) Also: ***Caterpillar Inc. v. Dept. of Treasury Revenue Div.*** 440 Mich 400, 488 NW 2d 182 (1992) "Specific constitutional provision at issue must be identified as well as how it was violated."

In ***Whitcomb v. Young*** 258 Ind 127, 279 NE 2d 566 (1972) also: ***Knapp v. O'Brien*** 288 Minn 103, 179 NW 2d 88 (1970) also: ***Bagley v. Blankenship*** 161 W. Va 630, 246 SE 2d 99 (1978) "Where a constitutional provision is comprehensive in scope and leaves no room for interpretation a court is without power to amend, add to, or detract from a constitutional provision or create exceptions thereto."

In ***Barron v. City of Baltimore*** 32 US 243, 8 L Ed 672 1833, WL 4189 "In all cases involving a Federal Constitutional matter the courts of the United States have the final authority."

In ***Peterson v. Williams*** 85 F. 3d 39, 2d Cir 1996 "Absolute words of the constitution derive their meaning from their context, and it is to the context that the court must look."

In ***Moberly v. Herboldsheimer*** 276 Md 211, 345 A 2d 855 (1975) "Even when a constitutional provision is subseptible of two constructions it should be given a construction that will not nullify legislation."

Wherefore the Constitutional grounds for granting the Writ of Certiorari are affirmed.

The statutory grounds for failure to apply the Federal Statute as previously ruled upon by this Court and other appeals courts follows:

In Re Arizona Appettitos Stores Inc 893 F 2d 216 "Statutory language according to its terms is to be enforced by the Court of Appeals which interprets Federal statutes by ascertaining the intent of Congress."

In Securities Exchange Commission v. McCarthy 322 F 3d 650 "Congress explicit decision to use one word over another in drafting a statute is material."

In Siripongs v. Davis 282 F. 3d 755 (2002) "In the interpretation of a statute Court of Appeals looks to general principles of statutory construction and begins with the language of the statute itself."

In Difford v. Sec. of Health & Human Services 910 F. 2d 1316, also: ***Provident Life & Acc. Ins Co v. United States.*** 740 F. Supp 492, "Under rules of statutory construction, if intent of Congress is clear, courts must give effect to the statute as written."

Specific support of what must be done when an action is removed from state court to Federal Court in support of the constitutional provision Article VI, and the statute USCS 1446(d)

In Moore v. Interstate Fire Insurance Co SD Miss 1989, 717 F. Supp. 1193 "When case is removed from state court to Federal Court, entire action, including all parties, claims, is transferred to federal court and state court may not proceed further unitl case is remanded. The Federal Court acquires full and exclusive jurisdiction over case as though it had been commenced in that forum."

Wherefore Petitioners remind this Court that the false Plaintiff in the Florida action for judicial accounting never attempted to affirm its action by continuing any proceeding after proper remand on March 29, 2005.

In Sands v. Geller SD NY 1971, 321 F. Supp 558 "Removal of a diversity action from state to Federal Court halts all further proceedings in the state court which thereupon loses jursidiction until the case is remanded."

In Saslow v. State Farm Mutaul Auto Ins. Co DC Alaska 1963, 224 F. Supp 965 "Effect of removal of case to federal court was to deprive state court of jurisdiction to proceed further with any phase of litigation in the removed

case, unless and until remanded."

In Re Wellington Resources Corp ND Tex 1982, 20 BR 64 "Removal to federal district courts of proceedings pending in state court deprives state court of further jurisdiction."

In Ward v. Resolution Trust Corp 1992, 972 F. 2d 196, 507 US 971. "State Appellate court could proceed no further after case was removed to federal court and that state appellate court ruling and order was null and void."

The matter of the application of "res judicata" to the fraudulently filed action for judicial accounting in a Florida probate court, by affirming the judgment obtained in violation of federal statute, violation of the United States Constitution, and in violation of the "res judicata" principles is also a matter for granting the Writ of Certiorari.

In Kirven v. Virginia /Carolina Chemical Co 58 SE 424 ,77 SC 493, Affd 30 SCT 78, 215 US 252, LED 179 "Under the rulings of the United States Supreme Court a judgment is not "res judicata" in a second action, on a different cause of action , unless the question was actually litigated in the original action."

Wherefore the Appeals Court for the Second Circuit ruled that the issue "could have been litigated" yet Petitioners had proven that a New York Trust cannot "could have been litigated" in a Florida Court when under New York Trust Law no trustee, fraudulent or otherwise has any power over a trust or its beneficiaries once the trust has ended, and there was no question of honoring New York Trust law as required on a New York Trust in a Florida court.

There are 8 rules of "res judicata" that a court must use to render such decision.

Rule 1- Identical parties. In ***Lubrizol Corp v. Exxon*** 932 F. Supp. 326 SD Texas 1986 "Employment by one of the parties does not provide sufficient privity for the purpose of meeting the identical party requirement of "res judicata" **It order to deceive the tribunal, Northern Trust Corporation attorneys always file pleadings with "Northern Trust Corporation" hereafter known as "Northern Trust"** In the instant matter, Northern Trust Bank of Florida, N.A. entered a Florida probate court falsely claiming to be the successor trustee. When the Northern Trust Corporation of Chicago was sued for mismanagement and ultra vires acts in a New York Federal Court, the attorneys for the Respondent paraded this action as if the parties were "identical". No privity extends to separate and distinct companies of the Northern Trust Corporation since they all retain separate and distinct jurisdictional rights and purpose. "Northern Trust" is not an entity entitled to file pleadings, and the term is used to deceive the Court into believing that everything is just a "Northern Trust". In fact fictitious names may not be used in Court papers.

The Northern Trust Corporation players in this scenario are: Northern Trust Corporation a public company with headquarters in Chicago, registered in Delaware; Northern Trust Company, the trust arm of the corporation which handles all trust administration and management and is an Illinois State Bank restricted to Illinois Courts, and never sued by the Petitioners. Northern Trust Bank of Florida, N.A., a national bank confined to the State of Florida, but since federally chartered required to obey the federal statutes and rules and regulations of the Office of the Comptroller of the Currency. Never sued by the petitioners.

Rule 2 of "Res Judicata" The judgment which grants "Res judicata" must be legally valid and binding. The judgment which the district court accepted is null and void by action of USCS 1446 (d) having been obtained in violation

of a federal statute and by constitutional restraint.

In McClellan v. Chapman 164 US 347, 357, also: ***David v. Elmira Savings Bank*** 161 US 275, 283: also ***In Re Office of the Comptroller of the Currency*** WL 486347 (1992) "The doctrine of Federal Preemption is based upon the supremacy clause of the United States Constitution Article VI clause 2 "This Constitution and the laws of the United States shall be the supreme law of the land...and laws of any state to the contrary...notwithstanding. This principle is sanctioned by repeated adjudication in this Court."

Rule 3 of "Res Judicata" requires the raising of identical issues in both actions. In ***Jimenz v. Shippy Realty Corp*** 622 NYS 2d 983, 213 AD 2d 377 also: ***Van Wie v. Van Wie*** 507 NYS 2d 486, 124 AD 2d 353; also ***641 Ave of the Americas Ltd Partnerships v. 641 Association Ltd*** 189 BR 583 "Res Judicata" only applies to a final judgment when it is rendered on the merits in a prior action."

Rule 4 of "Res Judicata" requires that the issues have been actually litigated in the prior action. The only issue presented without participation of the Petitioners was that statements had been delivered. In deliberate fraud since not a single statement came from Florida or was sent from Chicago to Florida, a prime requirement for any jurisdiction in a Florida court.

In ***Amalgamated Sugar Co. v. NL Industries Inc.*** 687 F. Supp 87; also ***Rothenberg v. Amalgamated Sugar Co.*** 108 S Ct 571, 484 US 992, 98 LED 2d 571 "For "Res Judicata" to apply to a judgment there must be identical issues in the two actions involved."

Rule 5 requires that the parties have a full and fair opportunity to litigate the issues. The reading of the false judgment of January 27, 2005 makes it clear that the Petitioners were not even noticed of the trial and that the false Plaintiff even filed a motion to prevent the petitioners from even attending the trial, and that there was no "trial"

upon the presentation of statements the court affirmed that judicial accounting had been approved. The Florida court never even "bothered" to ascertain if the delivery of such statements afforded the court jurisdiction.(Appendix B)

In ***Tole SA v. Miller*** 530 F. Supp 999, Affd 697 F. 2d 298; also: ***Jeanson v. Middle Grove Estates*** 634 NYS 2d 818, 222 AD 2d 782. "Questions which must be answered when determining whether issue preclusion applies from litigation in a previous action are: Is the bar asserted against the same parties? is the issue the same? was it resolved on the merits? was there a full and fair opportunity to litigate the issue in the first action?

In Re Schwarz 36 BR 355 "Before Collateral estoppel may be given to factual issues underlying a prior action, they must be the same and have been actually litigated."

In Barol v. Barol 464 NYS 2d 561, 95 AD 2d 942 "Collateral estoppel would not apply where Plaintiff had yet to litigate the issues."

In Juan C. v. Cortines 657 NYS 2d 561, 89 NY 2d 659, 679 NE 2d 1061, also: ***Kaufman v. Eli Lilly & Co*** 492 NYS 2d 584, 65 NY 2d 449, 482 NE 2d 63 "Party seeking benefit of collateral estoppel has the burden of demonstrating identical iossues were litigated".**The Federal District Court failed to require the Respondent to make that proof!**

Rule 6 denies "Res Judicata" if the prior action was undertaken in fraud.

In Ryan v. New York Telephone 62 NY 2d 494, 500 (1984) "An action undertaken in fraud does not trigger "Res Judicata" **Although in Appendix A, the order from the district court states that the Petitioners have alleged a fraud in that the Northern Trust Bank of Florida, N.A. was not the successor trustee of the trust and had no standing to pursue an action in a Florida Court**, in the same document in a strange inconsistency, the court states that the "Plaintiffs were aware of their claims (the fraud)

"accordingly the fraud exception to res judicata would not apply?" **The court is grossly wrong. The Plaintiffs were aware of the fraud and expressed it to the court so the fraud exception to res judicata must apply, not the other was around!**

Rule 7 requires that the claims actually be litigated.

In ***McLaughlin v. State of New York Governor's Office.*** 784 F. Supp 961 "Under New York Law "Res Judicata" operates as a bar to only those claims which could have been raised in a prior proceeding, however it does not bar litigation over claims over which the prior tribunal lacked authority or jursidiction to litigate."

In ***State Hospital for the Criminally Insane v. Consolidated Water Supply Company*** 110 A 281, 267 PA 29 "Res adjudicata" relates to the conclusiveness of prior judicial findings based upon the same facts as those involved in the pending controversy between the same exact parties over the same subject matter."

Rule 8 requires that the court before making a determination of "res judicata" review all factors of the prior decision.

In Khol Cahridum Kirays Joel v. Village of Kiryas Joel 935 F. Supp 450 "Determination of finality of purpose of claim preclusion must require the court to look at all the factors governing the nature and conduct of the previous decision" **It is clear that the district court failed to do that.**

Wherefore the major issue of 'res judicata" has been shown to require this Court to permit the Writ of Certiorari to properly settle the matter.

The final issues are probate exception and the award of attorney fees by a Florida Court for an action in a Federal Court in New York, not against the same party in the Florida Court and once again in violation of federal law. Federal law only permits the award of attorney

fees in a federal court if a federal statute permits such award.

The Irving G. Kates New York Trust is protected under the New York State Surrogate Procedure Act Article 14, sections 1401-1424. Probate is defined as the settlement of wills and estates. Under the law an express trust is defined as either an inter-vivos or testamentary trust and that the courts of first jurisdiction over trusts are the Supreme Court of the State of New York which defined in federal terms is a regular court of equity.

In ***Celtano v. Purer*** SD NY 602 F. Supp 777 (1985) "The probate exception to federal diversity jurisdiction concerns will and estates only."

In ***Farrell v. O'Brien*** 199 IS 89, 50 LED 101, 25 S Ct 727 "Where state laws authorize suit in courts of general jurisdiction to determine the adjudication of trusts, federal jurisdiction may be invoked for the same purpose of grounds of diversity of citizenship"

In ***Day & Zimmerman Inc. v. Calloner*** 96 S. Ct 167, 423 US 3, Tex 1975 "In conflict of laws to be applied by a federal district court in a diversity case, laws applied must be those prevailing in the state where the court is located, and which prevail in state courts."

Wherefore the probate exception cannot apply to a New York Trust in a New York federal court and the court was noticed that the Florida probate action was fraudulent and could not form the basis for a probate exception ruling..

The Appeals Court for the Second Circuit was supplied with the entire ruling of ***Marshall v. Marshall*** S. Ct 2006 WL 113194 US. In that ruling the appeals court for the second circuit, without warrant from Congress or from decisions of the Supreme Court broadened acceptance of the probate exception which has no standing in any federal

law or in the Constitution to include a New York Trust proven to have been wrongly adjudicated in the courts of the state of Florida, without recognition that a New York Trust may not be subject to adjudication by a trustee against the beneficiaries once the trust had ended under New York Estates, Powers and Trusts Law. Once the trust ends under New York Law, the trustee, no matter who that might be losses all rights to hold trust assets, to plunder trust assets or to file litigation against beneficiaries.

The probate exception issue is an important review by this Court which should issue a writ of certiorari.

Appendix C, is an order from the court in the state of Florida, wherein attorney fees are ordered from the trust against the petitioners in an additional order in which the Florida Court affirms its rights in the judgment of January 27, 2005, a judgment that by action of federal law is null and void, (Appendix B)

In ***Crolwey Amer. Trans. Inc. v. Richard Sewing Machine Co.*** 172 F. 3d 781CA 11 Fla 1999, "Under the American Rule attorney fees are not available in the absence of common law, statutory exceptions or a contract provision" **No company of the Northern Trust Corporation ever presented or executed any agreements or contracts with the beneficiaries of the trust outlining conditions and respective rights of the parties for trust administration or management, in violation of state and federal laws.**

In ***Tanker Management Inc. v. Brunson*** 918 F. 2d 1524 "Attorney fees are not recoverable unless statute that created the cause of action expressly provides for attorney fees."

In ***Kreager v. Solomon & Flanagan*** PA 775 F 2d 1541, 27, Wage & Hour Cas. BNA 689, "Absent a specific provision of Congress a federal litigant may not recover attorney fees."

In ***Amalgamated Clothing & Textile Workers Union v. Walmart Stores Inc.*** 54 F. 3d 69 "Courts may not award attorney fees absent statutory or contractual authority."

Wherefore the illegal award of attorney fees by a Florida Court against the petitioners for an action filed against not the same party in a New York Federal Court violates federal law.

The granting of the Writ of Certiorari will enable the issues outlined herein to receive the proper attention and ruling that have been lacking heretofore and the *Petitioners believe that they have made a sufficient case for this Court to issue a Writ of Certiorari.*

This petition for a Writ of Certiorari should be granted by this Court.

Prepared at Muttontown, New York on this 3rd day of August 2007 ,and respectfully submitted to this Court.

Philip Barash

Executor, Estate of Celia Kates
Philip Barash, pro se

Sandra Barash

Beneficiary, Irving G. Kates Trust
Sandra Barash, pro se
6 Serenite Lane
Muttontown, New York 11791
516-621-8665

(SUPCOVER)

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EXCUTOR OF THE ESTATE OF CELIA KATES, PHILIP BARASH, BENEFICIARY OF THE IRVING G. KATES TRUST, SANDRA BARASH,

Plaintiffs, **MEMORANDUM OF DECISION AND ORDER**

-against- 04-CV-5153 (DRH)(WDW)

NORTHERN TRUST CORPORATION, WILLIAM A. OSBORN. CEO and GWEN BOYKIN.

Defendants.

APPEARANCES:
PHILIP BARASH, PRO SE
6 Serrenite Lane
Muttontown, New York 11791

KATTEN, MUCHIN, ROSENMANN
Attorney for the Defendants
575 Madison Avenue
New York, New York 10022
By. Jay W. Freiberg, Esquire

HURLEY, District Judge:

Plaintiff, Philip Barash as Executor of the Estate of Celia Kates and his wife, Sandra Barash, (collectively,

"Plaintiffs" filed the present action against the Northern Trust Corporation ("Northern Trust"), William A. Osborn, Ceo, and Gwen Boykin (collectively, "Defendants'), asserting multiple claims arising out of the Defendants alleged mismanagement of a trust. Defendants have moved to dismiss the Amended Complaint pursuant to the Federal Rules of Civil Procedure 12 (b)(1)(2)(3)(6) and (7). For the reasons that follow, Defendants' motion is granted and this case is dismissed in its entirety.

BACKGROUND

This action arises out of a testamentary trust created under the will of Irving G. Kates, dated December 10, 1982 (the "Trust") (Am Compl, Ex 2) Upon Irving G. Kates death in 1988 (see id at Ex 4) and according to the terms of his will, the initial trustees of the trust were his wife,Celia Kates, and his two daughters, plaintiff Sandra Barash and non party Gloria Kates. (Id Ex 2) Celia Kates had a lifetime interest in the trust and Sandra Barash and Gloria kates were the remainder beneficiaries, (id) Pursuant to the terms of the trust it terminated upon the death of Celia Kates.(id)

Pursuant to a settlement agreement between the initial trustees and others dated September 26, 2001 "Northern Trust, 440 Royal Palm Way, Palm beach Fl 33480 became the sole Trustee of the Trust (Id Ex 3) Attached as exhibits to the amended complaint are two letters from Northern Trust, 440 Royal Palm Way, Palm Beach, Florida 33480 to Sandra Barash, dated May 13, 2003 and July 13, 2004, respectively, regarding ,matters related to the trust (ID Exs 16, 18)

Following the death of Celia Kates in August 2004, Northern Trust Bank of Florida commenced a proceeding in the probate division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida to settle its final account and to thereafter distribute the Trust's assets. (ID EX 12) After a trial the probate court entered a footnote 1

The amended complaint includes 28 exhibits, all of which

the Court has considered in deciding the present motion. See Leonard F. v. Israel Discount Bank of N.Y. 199 F. 3d 99, 107 (2d Cir 1999)(In adjudicating a Rule 12 (b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters which judicial notice may be taken)

final judgment on January 27, 2005. (id) The court held that the principal place of administration of the trust was in Palm Beach County, Florida for the entire time which Northern Trust served as trustee and thus this court has venue and jurisdiction. (Id) The probate court further approved all of Northern Trust's accountings. According to the Defendants distribution of the net assets to the beneficiaries has not yet occurred because Philip Barash has appealed the final judgment to the Florida District Court of Appeals and has also sought a stay of its enforcement. (Defs Mem at 5)

The thrust of the Plaintiffs' allegations in this action is that pursuant to its own terms the Trust appointed defendant Northern Trust as Trustee, not Northern Trust Bank of Florida, N.A. the party which initiated the probate action. Accordingly, Plaintiffs allege, Northern Trust illegally posed as a Florida corporation, to wit, Northern Trust Bank of Florida, N.A. to gain access to the Florida Probate Court and falsely claimed that the trust was a Florida trust governed by Florida law. Plaintiffs allege that Northern Trust, a national bank is the real party in interest, and thus Northern Trust Bank of Florida, N.A. had no standing to bring the Florida action and did so fraudulently. Thus the Plaintiffs allege that Northern Trust induced the Florida Probate Court to violate the law by wrongfully entertaining the suit. Because, Northern Trust Bank of Florida, N.A. is a wholly owned subsidiary of Northern Trust, Plaintiffs allege that Northern Trust is liable for its acts. Plaintiffs assert fourteen causes of action based upon Northern Trust's

alleged fraudulent initiation of the Florida probate suit and its alleged mismanagement of the trust. The amended complaint also names as defendants William A. Osborn, Chairman, Chief Executive Officer, and President of Northern trust and Gwen Boykin, Vice President of Northern Trust Bank of Florida, N.A.

DISCUSSION

1- Applicable Law and Legal Standards

The Court may not dismiss a complaint under Rule 12 (b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Aetna Cas. and Sur. Co v. Aniero Concrete Co, 404 F 3d 566, 604 (2d Cir 2005). The Court must accept all factual allegations in the proposed complaint as true and draw all reasonable inferences in favor of the plaintiff King v. Simpson, 189 F. 3d 284, 287 (2d Cir 1999) Jaghory v. New York State Deot of Educ, 131 F 3d 326, 329 (2d Cir 1997)

2- The Probate Exception to Diversity Jurisdiction Applies to this Action.

In the instant case, subject matter jurisdiction is predicated upon diversity jurisdiction. Such diversity jurisdiction requires that parties be completely diverse and the amount in controversy exceed $ 75,000. 28 USC 1332. However, even when these requirements are satisfied, the Supreme Court has held that probate matters are excepted from the scope of federal diversity jurisdiction. Moser v. Pollin, 294 F 3d 335, 340 (2d Cir 2002)(quoting Markham v. Allen 326 US 490, 494 (1946) The reason for this limitation is that in equity jurisdiction conferred by the Judiciary act of 1789...which is that of the English Court of Chancery in 1789, did not extend to probate matters.Id (quoting Markham 326 US at 494)

A two part inquiry is used to determine whether a particular lawsuit implicates probate matters such that the probate exception to federal diversity jurisdiction applies. Id Satisfaction of either part mandates the dismissal of the matter for lack of subject matter jurisdiction. Id. The first part of the inquiry requires the Court to examine if the federal district

court sitting in diversity (is) being asked to directly probate a will or administer an estate. Id. Such functions are purely probate in character and are considered to be categorically outside the jurisdiction of federal courts. Id (citing Markham 326 US at 494). This first part of the inquiry is rarely satisfied.

The second inquiry direct the Court to determine whether entertaining the action would cause the federal district court to interfere with the probate proceedings or assume general jurisdiction of the probate control of property in the custody of the state court. (Id quoting Markham, 326 at 494.)

Here the exercise of jurisdiction would impermissibly interfere with the Florida probate proceedings as the accountings approved by that court could be potentially rendered meaningless should this Court entertain the case. The instant dispute between the parties turns singularly on the proper identity of the trustee and whether it mismanaged the trust. These issues have already been decided, either directly or indirectly by the Florida Probate Court. By Footnote 2

In this regard, the Court notes that the instant action is also barred under the doctrines of res judicata and collateral estoppel. See Storey v. Cello Holdings LLC, 347 F 3d 370, 380, (2d Cir 2003)(Under the doctrine of res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action)(internal

quotation marks and citations omitted) Uzdavines v. Weeks Marine Inc, 418 F 3d 138, 146 (2d Cir 2005)(Collateral estoppel or issue preclusion applies where (1) the identical issue was raised in a previous proceeding (2) the issue was actually litigated (3) the party had a full and fair opportunity to litigate the issue (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.) (internal quotation marks and citations omitted) Although there is a fraud exception to the application of res judicata see Moser, 294 F 3d at 342 (citing Ryan v. New York Tel Co, 62 NY 2d 494, 500 (1984) there are no allegations here that defendants alleged fraud prevented the Plaintiffs from asserting their fraud claims in the probate action. See e.g. Welson v.US 70 F 3d 1, 5 (2d Cir 1995). In fact the Amended complaint demonstrates that Plaintiffs were aware of their claims regarding Northern Trust and Northern Trust Bank of Florida, N.A. during the pendency of the probate suit. Accordingly, the fraud exception to res judicata would not apply in this case.

filing the instant suit, Plaintiffs undoubtedly seek to obtain a different result that that received in the Florida probate action Such an interference with the functions of s state probate court is prohibited by the probate exception to federal diversity jurisdiction. Moser, 294 F 3d at 345.

Moreover, Plaintiff attempt to circumvent this conclusion by alleging the existence of federal law that presumably was beyond the jurisdiction of the probate court is misguided as Plaintiffs have wholly failed to sufficiently allege any such violation. All of the claims asserted in this action were either raised or could have been raised in the Florida Probate Court.

CONCLUSION

For all of the above reasons, Defendant's motion to dismiss is GRANTED as to all of the Plaintiffs' claims, and this case is DISMISSED in its entirety. The Clerk of the

Court is directed to CLOSE this case.
SO ORDERED
Dated : November 17, 2005
Central Islip, New York _____/s/_____
Denis R. Hurley
United States District Judge

footnote 3

To the extent Plaintiffs allege that the Florida Probate Court erroneously exercised jurisdiction because the Plaintiffs had removed that action to this Court, the claim has already been rejected by this Court in case no 04 CV 5295, wherein the Court found that the Plaintiffs improperly removed the probate action to this Court and remanded it back to Florida (See Northern Trust Bank of Floirda N.A. v estate of Celia Kates, 04 CV 5295 remanded March 29, 2005.

***Judge Hurely admits that the case was remanded on March 29, 2005 yet fails to explain how a judgment in the Florida probate action could have taken place while the case had been removed in violation of USCS 1446 (d) with that judgment on January 27, 2005!**

APPENDIX B

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH,
COUNTY, FLORIDA

IN: RE TRUST UNDER THE
WILL OF IRVING G. KATES PROBATE DIVISION
_____/

NORTHERN TRUST BANK OF
FLORIDA, N.A., Trustee CASE: 502004CP004511

Plaintiff, XXXXMB

vs.

ESTATE OF CELIA KATES
By its Executor, SANDRA BARASH
and GLORIA KATES,

Defendants.

_____/

FINAL JUDGMENT

This cause came for trial on January 27, 2005. Northern Trust Bank of Florida, N.A., ("Northern Trust") trustee, the Plaintiff, was represented by Pressly & Pressly, P.A. and Defendant Gloria Kates was represented by Page, Mrachek, Fitzgerald & Rose, P.A. Sandra Barash and Philip Barash did not appear. They were properly noticed for the trial

_____

1- Although Gloria Kates was nominally a Defendant, she admitted the allegations of the Complaint and for all practical purposes became a Co-Plaintiff. Neither Sandra Barash nor Philip Barash as Executor/Temporary of the Estate of Celia Kates filed a pretrial stipulation nor attended nor participated in the trial. Plaintiff noticed Sandra Barash for her deposition on January 5, 2005, she failed to appear, and a Notice of Non-Appearance was filed (D.E. # 70)

Pleadings

The Complaint filed by Northern Trust Bank of Florida N.A., Trustee requested the Court to settle and approve the accounts of the Trustee, award attorney fees to the Plaintiff and allocate the fees pursuant to 737.2053 (3) Fla. Stat if deemed appropriate by the Court. and direct distribution of the remaining assets in the Trust, and discharge the trustee from liability as provided in 737.201 (1)(b) Fla. Stat. Beneficiary Gloria Kates admitted the allegations of the Complaint and joined in the request that the relief be granted \and has assrted that the fees of the Trustee's counsel should

be allocated against Sandra Barash's share of the Trust.

Sandra Barash and Philip Barash filed an answer not in compliance with the Florida Rules of Civil Procedure and failed to deny allegations in the complaint and thus all factual allegations in the complaint are deemed admitted. See Heingold Commodities Inc v. S. Dale Trude 508 So 2d 1327 Fla 4th DCA 1987. Nonetheless Plaintiff did not rely on the deemed admission and offered evidence and proof of all of Plaintiff's claims.

Defendants Sandra Barash and Philip Barash moved to dismiss the Complaint on grounds of venue and jurisdiction. The Court denied the motion without pejudice and permitted the Barashs to raised the issue at trial. (D.E. # 27) The Court now denies the motion to dismiss with prejudice. Jurisdiction amd venue were established at trial.

The Trial

At the trial on January 27, 2005 Northern Trust adduced into evidence accountings from the inception of the trust in September 2001 through the date of the trial; the testimony of Gwendolyn Boykin; and the Court took judicial notice of the pleadings filed by the Barashs in the Federal District Court in New York.

Attorney Fees

The Court received documentary evidence, fact testimony, and expert witness testimony from Willam E. Boyes, Esquire with respect to the fees and costs of counsel for the Plaintiff, Northern Trust and Defendant, Gloria Kates by way of deposition testimony.

Rulings

Having considered the evidence and heard arguments of counsel it is ordered that judgment is entered for the Plaintiff, Northern Trust Bankof Florida, N.A., trustee, and for Gloria Kates (nominal defendant) and against Sandra Barash and Philip Barash as temporary executor of the Estate of Celia Kates. The Court finds and enters judgment as follows:

1- The Barashes Motion to Dismiss on grounds of venue and jurisdiction is denied. The principal place of administration of the Trust was Palm Beach County, Florida for the entire time which Northern Trust served as Trustee and thus this Court has venue and jurisdiction pursuant to 737.101; 737.202 and 737.201 Fla. Stat.

2- The accountings for the period from the time that Northern Trust took office as trustee, September 2001 through February 2004 were properly served on the beneficiaries are a deemed approved pursuant to 737.307 Fla Stat. In addition the Court approves and settles the accountings submitted into evidence at trial for this period.

3- The accounting for the period from February 2004 as supplemented up to the day of trial is approved and settled.

4- Plaintiff, Northern Trust is fully discharged and released from liability for its services as Trustee for the period from the date Northern Trust took office as trustee to the date of distribution of the assets of the trust as directed in the Final Judgment and shall go hence without day.

5- The Court approves and awards attorney fees for Pressly & Pressly to be paid from the corpus of the trust for the period August 16, 2003 through July 31, 2004 and finds that 145 hours expended by the law firm are reasonable at a blended hourly rate of $ 290 an hour for a total of $ 42,000 and costs of $ 3,000.

6- The Court approves and awards the attorney fees for Pressly & Pressly, P.A. to be paid from the corpus of the trust for the period August 1, 2004 through the date of trial and finds that 120 hours expended by the law firm are reasonable at a blended rate of $ 313 an hour for a total of $ 38,000 and costs of $ 3,300.

7- The Court awards expert witness fees to William E. Boyes in the amount of $ 1,225.

8- The Court finds that Page, Mrachek, Fitzgerald & Rose, P.A. have provided services to the trust and are entitled

to an award of attorney's fees.

9- The Court approves and awards the attorney fees for Page, Mrachek, Fotzgerald & Rose, P.A. to be paid from the corpus of the trust for the period October 7, 2004 through the date of trial and finds that 31.6 hours expended by the law firm are reasonable, the hourly rates charged by Page, Mrachek, Fitzgerald & Rose, P.A. are reasonable for a total of $ 5,836.

10- Pursuant to section 737.2053 (3) Fla. Stat. the Court finds that the attorney fees for Northern Trust and Gloria Kates counsel and costs incurred by Northern Trust counsel shall be paid from the Sandra Barash Sub-Trust.

11- After payment of attorney fees for Northern Trust's counsel and Gloria Kates'counsel and final trustee's fees and expenses and allocation of same, Northern trust shall distribute the remaining assets of the trust as follows:

A-,The Celia Kates subtrust shall be distributed forthwith, one half to Gloria Kates and one half to Sandra Barash, each of whom shall furnish the appropriate transfer or wire instructions to Northern Trust and Northern Trust shall have no obligation to make distribution until receipt of same.

B- With regard to the Gloria Kates subtrust, this court previously granted Gloria Kates' Motion for Partial Distribution and Northern Trust shall continue to hold the remaining amount in the Gloria Kates Sub-Trust pursuant to that order (D.E. # 67)

C- With regard to the Sandra Barash Sub-Trust, Northern Trust is directed to liquidate securities sufficient to pay the attorney fees awarded in this action and allocated to Sandra's subtrust plus a additional $ 100,000. That additional $ 100,000 in cash shall be retained by Northern Trust and invested in short term U.S. Treasury Bills or an equivalent money market fund until final deposition of any claims by Northern Trust for reimbursement of attorney fees and costs

incurred by Northern Trust as determined and awarded by this Court with respect to fees incurred by Northern Trust in the United States District Court for the Eastern District of New York, Case No CV 04-5153 and the United States District Court for the Eastern District of New York, Case No CV 04-5295. The remaining assets in the Sandra Barash Sub-Trust shall be transferred to Sandra Barash pursuant to transfer and/or wire instructions to be furnished by Sandra Barash and Northern Trust shall have no obligation to make distribution until receipt of same.

9- The Court reserves jurisdiction for enforcement of the terms of this judgment and for the entry of further orders as described herein.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida on this 27th day of January 2005

/s/ Karen L. Martin
KAREN MARTIN
Circuit Court Judge

*prior to the entry of this order, the court thoroughly considered the evidence. This order reflects the courts findings based on the evidence. (*handwritten)

APPENDIX C

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH,
COUNTY, FLORIDA

IN RE: TRUST UNDER THE
WILL OF IRVING KATES
_____/ PROBATE DIVISION

NORTHERN TRUST BANK
OF FLORIDA, N.A. Trustee, CASE: 502004CP004511
Plaintiff, XXXXMB

vs.

ESTATE OF CELIA KATES
By its Executor, SANDRA BARASH,
GLORIA KATES,
Defendants.
_____/

JUDGMENT ON ATTORNEY FEES AND COSTS

On March 21, 2006 this Court conducted an evidentiary hearing on Northern Trust Bank of Florida, N.A. Trustee's Amended Motion Re Attorney Fees and Costs and Other Relief.

The Court heard fact and other testimony, received documentary evidence, and heard arguments of counsel and of Philip Barash, pro se.

The Court finds in favor of Northern Trust Bank of Florida, N.A. and Gloria Kates and against Philip and Sandra Barash. The Court finds that reasonable attorney fees charge able to the trust pursuant to 737.2035 (2) and (3): 737.204 (4), and 737. 627 (1) and (2), Fla. Stat. for Pressly & Pressly, P.A. are $ 59,665 computed as follows:

Reasonable number of hours	205
Reasonable hourly blend	$ 291
Lodestar amount	$ 59,665
Reasonable costs are	$ 2,664

The Court finds that reasonable fees for Katten, Muchin, Rosenman, LLP are $ 138,516 computed as follows pursuant to 737.2035 (2) and (3): 737.204 (4) and 737.627(1) and (2) Fla. Stat. are chargeable to the Trust:

Reasonable number of hours	388
Reasonable blended hourly rate	$ 357
Lodestar amount	$ 138,516
Reasonable costs	$ 767

The Court awards Northern Trust expert witness William Boyes, Esquire, compensation in the amount of $ 5,250, computed at 15 reasonable hours at $ 350 reasonable hourly rate.

Based upon the evidence presented, the Court finds that all of the attorney fees and costs of Pressly & Pressly, P.A. and Katten, Muchin, Rosenman LLP must be charged to the share of Sandra Barash and no part of these fees and costs should be charged to Gloria Kates.

The Court reserves jurisdiction to award further fees and costs for counsel for Northern Trust Bank of Florida, N.A. and to enter further orders with respect to final distribution of the trust assets.

This judgment entered in West Palm Beach, Palm Beach County, Florida on this 29th day of March 2006.

/s/ Karen L. Martin
KAREN L. MARTIN
Circuit Court Judge

(Note: The fees for Katten, Muchin, Rosenman are for the Federal Lawsuit in New York and cannot be justified by Florida Statutes, New York or Federal Law)

APPENDIX D

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

IN RE: TRUST UNDER WILL
OF IRVING G. KATES PROBATE DIVISION
_____/

NORTHERN TRUST BANK

OF FLORIDA, N.A. Trustee CASE: 502004CP004511 XXXXMB

Plaintiff,

vs.

ESTATE OF CELIA KATES By its Executor, SANDRA BARASH, and GLORIA KATES,

Defendants.
_____/

ORDER ON NORTHERN TRUST BANK OF FLORIDA, N.A.'S MOTION TO QUASH AND DIRECT CLERK

Defendant's Motion to Quash **(* this order is invalid on its face because the Defendants filed no such motion. Motion was filed by the Plaintiff.)** And to Direct Clerk came on for hearing the 23rd day of December, 2004 and **(* Defendant's were not noticed to appear a violation of Florida Court Rules)** and the Court having heard arguments of the counsel for Northern Trust Bank of Florida, N.A; it is **(*Court does not even mention why the Defendants did not appear.)**

Ordered that the motion is granted. The Court finds that on the face of the claimed removal it is shown that there is no colorable claim and thus this Court need not recognize the removal See Hunnewell v. Palm Beach County 786 So 2d 4 (Fla 4th DCA 2001) Rev Denied 817 So. 2d 847 (Fla.2002) Without limitation on any other grounds on which removal is invalid it is plain for at least the following reasons it is invalid:

1- On the defendants in this cause, Gloria Kates, is a resident of Palm Beach County, Florida and under the plain jurisdictional requirements for an action to be removable, it

must be shown that none of the defendants are citizens of Florida (See 1441 (b) USCA.**(* in the judgment order of January 27, 2005 this Court clearly states that Gloria Kates is not a defendant, but a co-plaintiff. A false defendant may not be used to thwart removal)**

2- The place for removal, if removal were proper would be the United States District Court for the Southern District of Florida and not in the Federal District Court for the Eastern District of New York (See 1446(a) USCA) **(* when no basis for jurisdiction in Florida exists because of a fraudulently filed lawsuit, removal can take place to the state of proper jurisdiction.)**

3- The Notice of removal must be filed within 30 days after the service of the Complaint. Service was made on October 30, 2004 and the Notice of Removal was not filed in Federal District Court until December 6, 2004 (See 1446 (b) USCA) **(* service was illegal upon an executor in New York State unless and until he is appointed by the court. Appointment took place on December 17, 2004.) Also, Florida rules require that service in another state conform to the laws and rules of that state.)**

The Court retains jurisdiction over this cause and pending matters shall proceed as scheduled.

(*notes in paranthesis are Petitioner's notes and do not appear in the order)

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida on this 23rd day of December 2004.

/s/ Karen L. Martin
KAREN L. MARTIN
Circuit Court Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 8th day of November, two thousand six.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. JOHN M. WALKER, JR.,
HON. CHESTER J. STRAUB,
Circuit Judges.

SEAL
NOV 08 2006

Executor, Estate of Celia Kates, Philip Barash
beneficiary, Irving G. Kates Trust, Sandra Barash
Plaintiffs/Appellants,

No. 05-6311-cv

v.

Northern Trust Corporation,
William A. Osborn, Gwen Boykin
Defendants/Appellees

PHILIP AND SANDRA BARASH, pro se, Muttontown, NY

JAY WARREN FREIBERG, Katten, Muchin, Rosenman LLP (Julia Chung, on the brief) New York, NY, for Defendants-Appellees.

AFTER SUBMISSION AND UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is affirmed.

Appellants pro se appeal from the November 17, 2005 judgment of the District Court.

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for the Eastern District of New York (Denis R. Hurley, Judge) dismissing their complaint because claims (1) fell within the probate exception to federal diversity jurisdiction (2) were barred by claim preclusion, and (3) were barred by issue preclusion. We assume the parties familiarity with the balance of the facts and procedural history of the case.

The doctrine of claim preclusion prevents parties and their privies from re-litigating claims that were, or could have been raised in an earlier action that has resulted in a final judgment. See Storey v. Cello Holdings LLC 347 F 3d 370, 380-81 (2d Cir 2003) The fraud exception to this doctrine is limited; it does not permit litigant to collaterally attack a judgment on the ground of fraud, when the fraud could have been raised in a post trial motion or direct attack on the judgment. See Weldon v. United States , 70 F 3d 1,5 (2d Cir 1995) The District Court properly dismissed appellants' claims because those claims were raised or could have been raised, in an earlier proceeding in the Circuit Court of Florida. Accordingly, the judgment of the District Court is AFFIRMED.

FOR THE COURT
Thomas Asreen, Acting Clerk
By: Lucille Carr

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall US Courthouse at Foley Square 40
Centre Street, New York NY 10007
MOTION INFORMATION STATEMENT

Motion For:
Permission to file new evidence
for review by en banc panel.

SEAL
FILED MAY 15, 2007

ORDER:

Before: Hon. Richard J. Cardamone, Hon. John M. Walker, Jr.
Hon. Chester J. Straub, Circuit Court Judges
IT IS HEREBY ORDERED that the motion is DENIED.

JUNE 14, 2007

SEAL
JUNE 14, 2007
FOR THE COURT
Catherine O'Hagen Wolfe, Clerk
by Arthur M. Heller
Motions Staff Attorney

APPENDIX G

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
THURGOOD MARSHALL US COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Catherine O'Hagen Wolfe
Clerk

Docket Number: 05-6311-cv
Short Title: Executor of Cellia Kates, Philip Barash v. Northern Trust
DC Docket Number: 04-cv-5153
DC: EDNY (CENTRAL ISLIP)
DC Judge Honorable Colleen McMahon

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 19th day of JUNE two thousand seven.

Executor, Estate of Celia Kates, Philip Barash, Beneficiary, Irving G. Kates Trust, Sandra Barash
Plaintiffs/Appellants

v.
Northern Trust Corporation, William A. Osborn. Gwen Boykin

Defendant/Appellees

SEAL
JUN 19 2007

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant, Philip Barash. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.